UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16149

ROBERT E. WYNGAARD, APPELLANT,

v.

ROBERT F. KENNEDY, Attorney General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 29, 1961

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellant. *Mr. Chester C. Short* also entered an appearance for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee. *Mr. Oliver Gasch*, United States Attorney at the time the record was filed, and *Mr. Donald S. Smith* and *Miss Doris H. Spangenburg*, Assistant United States Attorneys, also entered appearances for appellee.

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

PER CURIAM: Section 212 of the Immigration and Nationality Act, 8 U.S.C. §1182 (1958), provides in part:

> (a) . . . the following classes of aliens . . . shall be excluded from admission into the United States:
>
> * * * * *

> (9) Aliens who have been convicted of a crime involving moral turpitude (other than purely political offenses) . . .

Section 241 of the Act, 8 U.S.C. §1251 (1958), provides in part:

> (a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . .

Appellant, a citizen of Holland, had been admitted to the United States for permanent residence in 1948. In 1955 he was convicted of violating §722(8) of the New York State Penal Law.[1] In 1957 he was readmitted to the United States after a trip abroad. The Immigration authorities, after due notice and hearing, determined that appellant's violation of § 722(8) was a "crime involving moral turpitude" and that appellant was deportable since he had been excludable at the time of his last entry into the country.[2] Appellant brought suit for declaratory and injunctive relief. On cross motions, the court granted summary judgment for the Government.

In this appeal appellant first contends that the District

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[1] This section provides in pertinent part:

> "*Disorderly conduct.* Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> • • • • •
>
> "8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness . . . ."

[2] In 1952 appellant was convicted of petty larceny in New York. The Immigration authorities held this to be a crime involving moral turpitude. Since both this conviction and the conviction for violating § 722(8) were classifiable as petty offenses under 18 U.S.C. § 1 (1958), the Immigration authorities noted that appellant could not be deported had he been convicted of only one violation. 8 U.S.C. § 1182a (1958).

Court erred in refusing to convene a three-judge court on the issue of whether the phrase "crime involving moral turpitude" in § 1182(a)(9) is unconstitutionally vague. This question was dispositively answered contrary to appellant's contention in *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). In light of that decision, we think no substantial constitutional question is presented, and the motion to convene a three-judge court was properly denied. Cf. *Eastern States Petroleum Corp.* v. *Rogers*, 108 U.S. App.D.C. 63, 280 F. 2d 611 (1960).

Appellant further contends that violation of § 722(8) of the New York State Penal Law is not a "crime involving moral turpitude" within the meaning of § 1182(a)(9). The Court of Appeals for the Second Circuit has held to the contrary in two well reasoned opinions. *Babouris* v. *Esperdy*, 269 F. 2d 621 (1959); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (1956). We follow them.

Affirmed.

Filed, June 29, 1961. Joseph W. Stewart, clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 3267-59

No. 16149

ROBERT E. WYNGAARD, APPELLANT,

v.

ROBERT F. KENNEDY, Attorney General of the United States,

APPELLEE

Appeal from the United States District Court for the District of Columbia

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

JUDGMENT

This cause come on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: June 29, 1961.

Filed September 30, 1960

RULING

The COURT (J. Holtzoff:) This is an action for a declaratory judgment to review an order of the Attorney General directing the deportation of plaintiff on the ground of conviction of crimes involving moral turpitude. The facts are not in dispute and only a question of law is involved. Both sides move for a summary judgment.

One of the convictions on which the deportation order is predicated is a conviction in New York State under Section 722 of the New York Penal Law, on a charge of frequenting or loitering about any public place soliciting men for the purpose of committing a crime against nature or other lewdness. This offense is denominated in New York Penal Law as disorderly conduct.

New York Statutes distinguish between crimes and offenses and the violation of law involved in this case is classified as an offense. It is argued on behalf of the plaintiff that the conviction on this charge cannot be regarded as a conviction of a crime involving moral turpitude under the Deportation Statutes.

This precise question has been before the 2d Circuit which held in two cases that a conviction under this New York Statute is a conviction of a crime involving moral turpitude. *Babouris v. Esperdy*, 269 F 2d 621, and *United States v. Flores-Rodriguez*, 237 F.2d 405 and 409. The Second Circuit very cogently argues that what constitutes a crime involving moral turpitude is a federal question and is not dependent on the manner in which state law classifies the violation of law. It is not the nomenclature or the label attached by state codes that governs but the nomenclature and the definitions of the federal statutes.

The Court is convinced by the reasoning of the Second Circuit and will follow the conclusion reached by that eminent Court. Under the circumstances this Court concludes that the plaintiff's conviction to which reference has been made is a conviction of a crime involving moral

turpitude, and for that reason on the record in this case the plaintiff is deportable.

Plaintiff's motion for summary judgment will be denied and the defendant's motion granted

You may submit your order.

Filed October 4, 1960

JUDGMENT

This cause having come before the Court on cross-motions for summary judgment; argument of counsel having been heard; and the Court, upon due deliberation, having considered the record and having rendered its oral decision that there is no issue as to any of the facts and that defendant is entitled to judgment as a matter of law,

It is on this 4th day of October, 1960,

ORDERED, ADJUDGED and DECREED:

(1) That defendant's motion for summary judgment be and hereby is granted; and

(2) That plaintiff's motion for summary judgment be and hereby is denied, and his action dismissed.

IT IS FURTHER ORDERED, that the Clerk of Court return to the United States Attorney the certified record of the Immigration and Naturalization Service relating to the plaintiff and filed in this cause.

(s) ALEXANDER HOLTZOFF,
Judge.

(8614-0)